Supreme Court, U.S.
FILED
AUG 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-31

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

FRIENDS OF WARWICK POND AND HOXSIE also
WARWICK LAND TRUST, PAUL HULING,
JEANNE M. FOSTER, EILEEN NAUGHTON and
KATHLEEN PREISS

Petitioners,

v.

CHILDREN'S FRIEND AND SERVICE, INC.,
FRANK P. SHERRY, R&F ASSOCIATES,
RHODE ISLAND CENTRAL CREDIT UNION and
JOHN DOES, ONE through FIVE

Respondents,

and

JAMES O'NEIL, in his capacity as
Rhode Island Attorney General

Additional Party-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RESPONDENTS' BRIEF IN OPPOSITION

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EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Whether it was plainly untenable and a denial of due process for the R.I. Supreme Court to carve out a new rule denying Petitioners standing and apply it retroactively against diligent representative plaintiffs disregarding (a) their demonstrated compliance with the R.I. adopted Federal standing/access barrier and (b) four prior R.I. Supreme Court decisions and a R.I. statute that the Attorney General, whom the plaintiffs had named at the outset, is but a necessary party to charitable trust litigation.

2. Whether it was plainly untenable, a denial of due process and a violation of Rule 56 of the Rhode Island (Federal) Rules of Civil Procedure to approve the granting of summary judgment on a record which shows (a) that the trial/lower court below's sole ultimate finding was based on a mistaken conception of its decisional authority, and (b) that important discovery—addressed to the movants themselves—was still outstanding and (c) that, at most, the defendants had raised merely a mixed question of law and fact.

3. Whether it was plainly untenable and a denial of due process for the R.I. Supreme Court to give weight to a purported R.I. Attorney General opinion (or finding) of "no fault" in the defendants' sale/purchase of the charitable property at issue ("Lakeside") for commercial real estate development which "opinion" (a) was not part of the record, (b) the plaintiffs had never seen, much less been given an opportunity to answer, and (c) whose existence was not asserted until the February 13, 1989 appellate oral argument.

4. Whether the United States Supreme Court will summarily reverse and remand for further proceedings a case which turns on state adopted Federal law (standing, *res judicata* and Rule 56 summary judgment) all patently violated by the courts below, thus depriving representative plaintiffs of their sole means of preventing monetary, recreational and environmental damage to themselves, their homes and their community.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The background of this matter begins in the second decade of this century, when Family Service, Inc. (then known as the "Providence Society for Organizing Charity"), a charitable corporation, acquired two (2) parcels of lakeside property totaling approximately twenty (20) acres, located in the Hoxsie section of Warwick, Rhode Island (hereinafter referred to as the "Lakeside property"). The two parcels were acquired as a result of absolute and unconditional gifts to a charitable organization, Family Service, Inc.

The first parcel was acquired, in fee simple, in a 1912 deed from William H.P. Faunce (a copy of the 1912 deed is attached hereto as R.A-1). The second parcel was acquired, also in fee simple, in a 1916 deed from Patrick Fitzpatrick (a copy of the 1916 deed is attached hereto as R.A-2). An examination of the 1912 and the 1916 deeds reveals that neither instrument expresses any intent to transfer property in trust. Both deeds are in fee simple without reference to any conditions.

In 1951, Family Service, Inc. initiated a "friendly suit," an action that in fact was unwarranted by the state of the record title, to obtain the authorization of the Rhode Island Superior Court (hereinafter referred to as "R.I. Superior Court") for the conveyance of the Lakeside property to a successor charitable corporation, Children's Friend and Service, Inc. (hereinafter referred to as "CF&S"). The authorization sought by Family Service, Inc. was granted pursuant to a decree of the late Presiding Justice Walsh of the R.I. Superior Court, *Family Service, Inc.* v. *Powers*, Eq. No. 21550 (February 16, 1951).

CF&S is not a trust; it is an independent, non-profit charitable corporation, organized to facilitate adoptions and provide medical and other care to children, including temporary homes for children pending custody, guardianship, or other judicial proceedings.

In its Bill of Complaint to convey the Lakeside property to CF&S, Family Service, Inc., specifically acknowledged that neither the 1912 deed nor the 1916 deed was "made in trust and no conditions as to the use and disposal of said Lakeside property were imposed by the grantor's or by the persons who caused said conveyances to be made." (a copy of the 1951 Bill of Complaint is attached hereto as R.A-3).

In the 1951 Bill of Complaint, the applicants recited their doubt as to whether any decree of the court was necessary to authorize the applicants to transfer title to CF&S. In fact, the 1951 court proceeding was entirely unnecessary since the predecessor charity, Family Service, Inc., held title to the Lakeside property in fee simple without any restrictions.

The R.I. Superior Court approved the conveyance of the Lakeside property to CF&S "to be held by said Children's Friend and Service for its general uses and purposes." (a copy of the 1951

final decree of the R.I. Superior Court is attached hereto as R.A-4). This is the classic language used to create a fee simple. The 1951 deed from Family Service, Inc. to CF&S contains the identical language conveying the Lakeside property to CF&S "to be held by said Children's Friend and Service for its general uses and purposes" (a copy of the 1951 deed from Family Service, Inc. to CF&S is attached hereto as R.A-5).

Approximately eight years ago, the Board of Directors of CF&S concluded that the Lakeside property was no longer suitable for child care facilities.[1] The Board decided to seek buyers for the Lakeside property, merely intending to change the form of one of its numerous assets from real property to cash, which would then be used for the general uses and purposes of CF&S in aiding children.

The Board of Directors of CF&S initially sought to sell the property to either the City of Warwick or the State of Rhode Island, but discovered that there were insufficient public funds to purchase the Lakeside property at its appraised value of Nine Hundred Thousand Dollars ($900,000). After exhausting all public sources of funds, CF&S sold the Lakeside property to respondent Frank P. Sherry on or about June 14, 1987. Subsequently, respondent Sherry conveyed the property to respondent R & F Associates.

The Petitioners are a group of homeowners in the area surrounding the subject property who lack any legal or equitable interest in the Lakeside property. The subject property is not a park or playground, and the general public is not and never has been invited to make any recreational use of the property. The Lakeside property is private property, and the Petitioners are neighbors who object to its sale simply because they are opposed to further development in their neighborhood.[2]

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1. A substantial portion of the property conveyed to CF&S in 1951 was later conveyed by CF&S to Saint Timothy's Church Corporation, which in turn sold some of the land for residential development.

2. The Petitioners allege that the sale of the Lakeside property was shrouded in secrecy, and imply that their attempts to contact the Directors of CF&S were somehow frustrated. (See Affidavit of Petitioner Paul Huling in Opposition to Motion for Summary Judgment, pages 15-25 of Petitioners' Appendix.) In fact, there had been reports in various local newspapers since approximately 1982, stating that the Lakeside property was for sale and *(continued)*

The Petitioners commenced this action on or about August 4, 1987, by filing an action in the R.I. Superior Court to void the sale and conveyance of CF&S's Lakeside property to respondent Sherry. The Petitioners also sought a declaratory judgment to the effect that the Lakeside property was held by CF&S as a charitable trust and any conveyance was therefore subject to the *cy pres* authority of the R.I. Superior Court. The Petitioners characterized this lawsuit as a class action, however, no class was ever certified.

A threshold Motion to Dismiss by CF&S pursuant to Rule 12(b)(6) of the R.I. Rules of Civil Procedure, was denied by the R.I. Superior Court on August 24, 1987.

On April 1, 1988, CF&S filed a Motion for Summary Judgment, pursuant to Rule 56 of the Rhode Island Rules of Civil Procedure. The Summary Judgment Motion was granted after oral argument on June 13, 1988, and an Order was entered on July 1, 1988 (a copy of the R.I. Superior Court's July 1, 1988 Order is attached hereto as R.A-6).

The Petitioners appealed on July 6, 1988 to the Rhode Island Supreme Court (hereinafter referred to as "R.I. Supreme Court") from the Order granting CF&S's Motion for Summary Judgment. Briefs were submitted by the parties (except the R.I. Attorney General, who adopted the brief of one of the Respondents), and oral argument was held on February 13, 1989. The R.I. Supreme Court summarily denied the Petitioners' appeal and an Order was entered on February 23, 1989 (a copy of the R.I. Supreme Court's February 23, 1989 Order is attached hereto as R.A-7). The Petitioners filed a Petition for Reargument on February 28, 1989, which was denied by the R.I. Supreme Court on March 13, 1989.

ARGUMENT

The Petition for Writ of Certiorari is wholly without merit and should be summarily denied by the Court. As more fully argued below, the Petitioners have failed to allege any federal question or

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chronicling the interest of several charitable agencies and developers. During this entire period, there were "for sale" signs posted on the property.

As far as any difficulty in contacting the Directors of CF&S, the simple truth is that CF&S is a United Way agency, which has on file the names and addresses of all CF&S officers and directors.

other valid basis for jurisdiction in this matter, and lack standing in this matter, and thus are not entitled to a judicial determination of the merits of their claim. The Respondents will address the questions presented in the following order:

(1) Jurisdiction;

(2) Standing;

(3) Summary Judgment; and

(4) Role of Attorney General

I.

JURISDICTION

This Court is being asked to review a decision by the R.I. Supreme Court affirming a R.I. Superior Court's grant of summary judgment in favor of Respondents. Jurisdiction is claimed under 28 U.S.C. Sec. 1257[3] and Supreme Court Rule 17 on the basis that the R.I. Supreme Court decided issues of federal law.[4]

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3. Section 1257 was recently amended by the Supreme Court Case Selections Act. Pub.L.No. 100-352, 102 Stat. 662 (1988). Paragraphs (1) and (2) of former Section 1257 were eliminated and only the *certiorari* procedure, of what was previously paragraph (3), was retained. Former paragraph (3) became subdivision (a) under new Section 1257. The last clause of the prior statute, treating the District of Columbia Court of Appeals as the equivalent of a State Court for purposes of Section 1257, was retained and lettered subdivision (b).

The Act became effective on June 27, 1988. However, the Act does not apply to cases, "Then pending in the Court or judgments or decrees subject to appeal that have been issued prior to the effective date of the Act." Supreme Court Case Selections Act, Pub. L. No. 100-352, Sec. 7, 102 Stat. 662 (1988). The R.I. Superior Court decision was issued on July 1, 1988. The R.I. Supreme Court decision was issued on February 23, 1989. A Petition for Reargument was denied on March 13, 1989.

The relevant decisions in this case occurred after the effective date of the amendment and therefore the amended version of Section 1257 applies in this case.

4. Petitioner also claims jurisdiction under 28 U.S.C. Sec. 2106. This section provides that:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. *(continued)*

Petitioners' claim of federal question jurisdiction must fail for the following reasons:

(a) The alleged federal questions presented in Petitioners' Writ of Certiorari were never raised with, or considered by, the R.I. Supreme Court; and,

(b) This case does not involve issues of federal law.

A. Failure to Present Issues to State Supreme Court

Respondents filed a Motion For Summary Judgment with the R.I. Superior Court on the basis that Petitioners lacked standing and that the real estate sale did not constitute a breach of trust. The R.I. Superior Court ruled that the real estate was not subject to the *cy pres* doctrine and that as a consequence thereof, there remained no material issue of fact to be resolved and that Respondents' were entitled to Summary Judgment as a matter of law.

Petitioners appealed this decision to the R.I. Supreme Court wherein they raised one question—"May a successor *cy pres* charity holder, acting unilaterally and without seeking or obtaining prior R.I. Superior Court authority, convey twenty acres of charitable recreational primarily open land (adjoining Warwick Pond) for private development and profit. . .[under certain factual conditions]." R.I. Supreme Court subsequently asked the parties to brief the following issues:

(a) whether a question of fact exists which should have precluded the entry of summary judgment,

(b) whether the trial justice erred as a matter of law in granting summary judgment even if no question of fact was disclosed on the record,

(c) whether the plaintiffs had standing to challenge the conveyances,

(d) whether issues presented by the parties have been preserved for appellate review.

Following briefing and oral argument by the parties, the R.I. Supreme Court denied and dismissed the appeal.

As outlined, infra, Petitioners do not have federal question jurisdiction in this case. Therefore, Petitioners are not lawfully before this Court and Section 2106 is without effect.

A Petition for Reargument was then filed on February 28, 1989. The Petition states in relevant part that:

> The Court's order/decision contains or represents clear error. Such error is appropriately demonstrated when viewed in three parts:
>
> (1) the Court's statement that only the [State] Attorney General has standing to bring suit regarding breach of charitable trust;
>
> (2) the undertaking of the R.I. Superior Court, if not this Court, to decide on summary judgment mixed questions of law and fact relating to
>
> (a) the trust nature of the Lakeside property and
>
> (b) whether the 1951 conveyance authorized by Judge Walsh's *cy pres* order constituted an unrestricted fee simple transfer; and
>
> (3) the Court's indicated reliance on an unpublished, non-recorded [State] Attorney General opinion or finding of "no fault" in CF&S' unilateral sale of the Lakeside property for commercial real estate development.

The Petition was summarily denied on March 13, 1989.

By letter dated March 16, 1989, Petitioners advised the R.I. Supreme Court that they planned to file a Petition for a Writ of Certiorari with the United States Supreme Court on equal protection and due process grounds. At the time that letter was written, Petitioners' civil action had terminated.

On June 10, 1989, Petitioners filed the within petition wherein they presented four questions for review. Petitioners' four questions are couched in terms of federal questions and federal constitutional issues. Notwithstanding Petitioners' drafting techniques, this Court does not have jurisdiction to pass upon any federal question or federal constitutional issue which was not raised or considered in the state court from which the appeal was taken. *Miller (for Use of United States)* v. *Nicholas*, 4 Wheat. 311, 315, 17 U.S. 311 (1819); *Murdock* v. *Memphis*, 20 Wall. 590, 87 U.S. 590 (1875); *Dewey* v. *Des Moines*, 173 U.S. 193, 197-201 (1899); *Whitney* v. *California*, 274 U.S. 357, 362-363 (1927); *McGoldrier* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435 (1940); *State Farm Mutual Automobile Ins. Co.* v. *Duel*, 324 U.S. 154, 160-163 (1945); *Safeway Stores*

Inc. v. *Oklahoma Retail Grocers Association, Inc.*, 360 U.S. 334, 342, n.7 (1959); *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969). See also *Illinois* v. *Gates*, 462 U.S. 213, 218-20 (1983).

The record in this case clearly demonstrates that no federal question or federal constitutional issue was ever raised with, or considered by, the R.I. Supreme Court[5] Consequently, this Court is without jurisdiction to consider Petitioners' appeal and the Petition for Writ of Certiorari must be denied.

B. Absence of a Federal Question

Federal question jurisdiction is claimed by Petitioners on the basis that (1) the decision below turned on issues of state adopted federal law, and (2) Petitioners were denied equal protection of the law and due process. Notwithstanding Petitioners' utter failure to present the R.I. Supreme Court with the questions raised herein, Petitioners' claim of federal question jurisdiction is without merit.

1. State Adopted Federal Law.

The R.I. Supreme Court's decision did not turn on state adopted federal law. To the contrary, the record clearly demonstrates that the courts below were presented with issues of state law involving standing and summary judgment and that state law formed the basis for their decisions.[6] However, even if one assumes that Rhode Island's law on standing and summary judgment was adopted or developed by reference to similar rules of

5. Petitioners argue that a federal question was presented to the R.I. Supreme Court in their Petition for Reargument. However, raising a federal question for the first time in a petition for reargument/rehearing addressed to the highest state court is insufficient unless the court actually entertains the petition and expressly decides the question. *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 128 (1945); *Hanson* v. *Denckla*, 357 U.S. 235, 243-44 (1958); *Herndon* v. *Georgia*, 295 U.S. 441, 443 (1935). As noted above, the Petition for Reargument was summarily dismissed: therefore, Petitioner's argument is without merit.

6. Petitioners argue that the R.I. Supreme Court's decision turned on state adopted federal law i.e., injury-in-fact standing, *res judicata* and its application to fundamental/subject matter jurisdiction. The issue of *res judicata* and its application to fundamental subject matter jurisdiction was never raised in the courts below, and therefore, its casual assertion in Petitioners' argument must be ignored.

law that exist in federal statutes or have emerged in decisions by federal courts, an assumption which Respondents reject, this Court has consistently held that state adopted federal law does not serve as a basis for federal question jurisdiction. *Miller's Executors* v. *Anderson,*150 U.S. 132 (1893). This case has also been referred to in the case law as *Miller's Executors* v. *Swann.* Later case law is consistent with *Anderson, See e.g., Moore* v. *Chesapeake & Ohio Ry.*, 291 U.S. 205 (1934); *Smith* v. *Kansas City Title Co.*, 255 U.S. 180 (1921); *Shoshone Mining Co.* v. *Rutter,* 177 U.S. 505, 507 (1900); *Union National Bank* v. *Louisville R.R.*, 163 U.S. 325, 331 (1896); *Mobil Oil Corp.* v. *Coastal Petroleum Co.*, 671 F.2d 419 (11th Cir. 1982), *cert. denied,* (1982); *Morris* v. *Danna,* 411 F.Supp. 1300 (D. Minn. 1976), *aff'd,* 547 F.2d 436 (8th Cir. 1977).

Petitioners' claim of federal question jurisdiction is based solely on the bald assertion that the decision below turned on state adopted federal law. This Court does not recognize a claim of "state adopted federal law" as a basis for federal question jurisdiction. Therefore, Petitioners' Writ of Certiorari must be dismissed for want of a federal question.

2. Federal Constitutional Issue.

In addition to their claim of federal question jurisdiction, Petitioners' claim this Court's jurisdiction on the basis that the court below committed plain error. Given Petitioners' obvious failure to present the court below with any federal issue, this claim is nothing more than an attempt to circumvent the Court's jurisdictional requirements under the guise of Supreme Court Rule 34.1(a) and 28 U.S.C. 2106.

Rule 34.1(a) provides:

> 1. A brief of an appellant or petitioner on the merits shall comply in all respects with Rule 33, and shall contain in the order here indicated:
>
> (a) The questions presented for review, stated as required by Rule 15.1(a) or Rule 21.1(a), as the case may be. The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. At its option, however, the

> Court may consider a plain error not among the questions presented *but evident from the record and otherwise within its jurisdiction to decide.*

Id. (emphasis added).

The italicized portion of Rule 34.1(a) emphasizes that the option to consider a plain error is exercisable not as a means of determining whether jurisdiction exists, but only to correct an error "evident from the record" that is "otherwise within its jurisdiction to decide." Jurisdiction must therefore be established on the basis of other federal questions, raised or decided below and presented to the Court, and the error itself must be federally grounded—this in fact is the context in which the Court has exercised the plain error option in state court cases. R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice* 166 (6th ed. 1986) citing *Terminiello* v. *Chicago,* 337 U.S. 1, 5-6 (1949); *Boynton* v. *Virginia,* 364 U.S. 454, 457 (1960); *Vachon* v. *New Hampshire,* 414 U.S. 478, 479 n. 3 (1974); *Wood* v. *Georgia,* 450 U.S. 261, 264-65, n. 5 (1981); and *Illinois* v. *Gates,* 462 U.S. 213, 219-220 (1983). As noted earlier, Petitioners have failed to establish a basis for federal question jurisdiction. Therefore, the claim of plain error is without merit.

Similarly, 28 U.S.C. Sec. 2106 allows the Court to "require such further proceedings... as may be just under the circumstances" in actions that are lawfully brought before it for review (emphasis added). This section "does not purport to expand the statutory limits on the Court's jurisdiction; rather, it relates only to the disposition of the case once jurisdiction exists." *Wood* v. *Georgia,* 450 U.S. at 281 (White, dissenting).

Respondents have clearly established that Petitioners failed to assert any federal issue in the court below and that federal question jurisdiction does not exist in this case. Therefore, Petitioners are not lawfully before this Court and Section 2106 is without effect.

II.

STANDING

A. The Petitioners Failed to Meet the Injury in Fact Test for Determining Standing to Maintain this Action

It is undisputed that, even if the legal claim is correct, the litigant advancing it must be properly situated to be entitled to its judicial determination. 13 C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure*, Sec. 3531 (1984). The standing requirement is an essential preliminary to reaching the merits of the claim, and the inquiry focuses on the party seeking to get his complaint before a federal court, not on the issues he wishes to have adjudicated. *Flast* v. *Cohen*, 392 U.S. 83, 99 (1968). It is the responsibility of the petitioner to clearly allege facts demonstrating that he is a proper party with standing to invoke judicial resolution of a dispute. *Warth* v. *Seldin*, 422 U.S. 490 (1975).

In order to satisfy the constitutional requirement of Article III that there be an actual case or controversy, courts require a plaintiff to have a personal stake in the outcome.[7] If the plaintiff cannot surmount the hurdle of standing, the court is precluded from deciding the merits of the plaintiff's case.

The Petitioners lack standing to maintain this action because they do not have any interest, whatsoever, in the conveyance of the Lakeside property. They are merely a group of neighbors objecting to the sale of a piece of property within their neighborhood. One cannot successfully invoke the jurisdiction of a court to enforce private rights, or maintain a civil action for the enforcement of such rights, unless one has in an individual or representative capacity some real interest in the cause of action, or legal or equitable right, title or interest in the subject matter of the controversy. 59 Am. Jur. 2d *Parties*, Sec. 30 (1987).

The only conceivable injury alleged by the Petitioners is that Lakeside property has been sold to a party who will develop the land. The Petitioners fear that the development of the Lakeside property will somehow lessen the monetary value of their homes,

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7. "The requirement that a prospective plaintiff must suffer injury in fact assures that such plaintiff will have the personal stake and interest that import the concrete adverseness required by Article III of the Constitution. . . without such injury in fact no case or controversy is present." *McDowell* v. *Schlesinger*, 404 F.Supp. 221, 242 (D.C.W.D. Mo. 1975).

a concern which is purely speculative on the part of the Petitioners.[8] They bring this action for their own selfish purposes; completely unrelated to the property in question or any of its uses. This so-called "injury" is not legally cognizable under any possible interpretation of the tests for standing as developed by the United States Supreme Court and by the R.I. Supreme Court. The principles of standing are of two sorts—constitutional and "prudential."

The constitutional standing rules seek to ensure that a concrete Article III case or controversy exists by focusing on the plaintiff's "harm." This analysis asks whether the plaintiff has "in fact" suffered a redressable injury as a result of the defendant's action.[9] The analysis imposes three strict requirements:

(a) Whether the plaintiff has suffered a distinct and palpable injury, *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472-474 (1982); *Matunuck Beach Hotel, Inc.* v. *Sheldon*, 399 A.2d 489, 493, 121 R.I. 386 (1979); *Renza* v. *Murray*, 525 A.2d 53, 55, __R.I.__ (1987);[10]

(b) a causal connection between the injury and the complained-of-acts; *Warth* v. *Seldin*, 422 U.S. at 519, (1975), *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74 (1978); and

(c) Whether this injury is apt to be redressed by a remedy that the court is prepared to give, *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41 (1976).[11]

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8. The risk of additional development in the surrounding area is one faced by all homeowners; a more suitable remedy for the Petitioners would have been a zoning challenge, however, Petitioners never pursued this course of action.

9. As stated in *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 (1973), the court's jurisdiction can be invoked only when the plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action. . ." (emphasis added).

10. Rhode Island adopted the "injury in fact" test for standing in *Rhode Island Ophthalmological Society* v. *Cannon*, 317 A.2d 124, 129, 113 R.I. 16 (1974): "The question is whether the person whose standing is challenged has alleged an injury in fact resulting from the challenged statute. If he has, he satisfies the requirement of standing."

11. The *Valley Forge Christian College* case, *supra*, is illustrative of both the constitutional and prudential principles. The Secretary of Health, Education and Welfare conveyed a surplus army hospital to a sectarian college, without charge, on the condition that for twenty years the facility *(continued)*

A plaintiff who has established the constitutional element of standing must go further and convince a court that various "prudential" considerations also warrant hearing the case, such as showing that his "injury" is of a sort against which the law seeks to protect him, or by showing that his claim falls within the zone of interests to be protected or regulated by statute or constitutional guarantee, *Valley Forge Christian College, supra,* 454 U.S. at 474-475.

In this matter, however, there is no need for consideration of any "prudential" rules of standing, because an examination of the legal rights and interests of the Petitioners discloses that the "injury" alleged here is totally abstract and speculative, and thus, is insufficient to satisfy the constitutional principles of standing. The Petitioners cannot allege a distinct and palpable injury to any legally protected interest because they have no legal or equitable interests in private property.

The Petitioners' claim of "monetary, recreational, and environmental damage to themselves, their homes, and their community" is outside any recognized concept of "injury." The Petitioners have not, and will not, suffer any recreational or environmental damage because the privately owned Lakeside property has never been available for use by neighboring landowners as a park or playground. The statement on page 11 of the Petition that "Lakeside is a mid-Rhode Island environmental oasis" is simply hyperbole; the Lakeside property has been used exclusively by CF&S for its own charitable programs and the land has been developed to the extent that CF&S in the past thirty-eight (38) years constructed several buildings at a cost of Three Hundred Thousand Dollars ($300,000). The only conceivable "injury" of the Petitioners is an abstract and speculative concern that the development of the Lakeside property will somehow erode their nearby property values.[12]

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be devoted solely to educational purposes. The plaintiffs, a taxpayer organization consisting of 90,000 members, brought suit to set aside the conveyance, claiming that the transaction violated the Establishment Clause of the First Amendment. The Supreme Court held that the plaintiffs lacked standing because they had not "alleged an *injury* of *any* kind, economic or otherwise, sufficient to confer standing." 454 U.S. at 480.

12. The Petitioners cite the case of *Blackstone Valley Chamber of Commerce* v. *Public Utilities Commission,* 452 A.2d 931, *(continued)*

The matter of *Simon* v. *Eastern Kentucky Welfare Rights Organization, supra,* is illustrative of cases involving speculative injury as a basis for standing. The plaintiff group consisted of an organization of indigents unable to afford hospital services which filed a lawsuit challenging a ruling by the Internal Revenue Service (IRS) allowing hospitals to qualify for "charitable" tax advantages without providing free care services to indigents.

At the outset, the *Simon* Court indicated that the indigent organizations could not establish standing simply on the basis of the goals of their organization. 426 U.S. 26, 41 (1976). The standing question, the Court noted, "turns on whether any individual respondent has established an actual injury, or whether respondent organizations have established actual injury to any of their indigent members," 426 U.S. 26, 41.[13]

The *Simon* Court concluded that, in light of the many factors that go into a hospital's indigent care policy, it would be "purely speculative" whether the indigent organizations would be denied free health services as a result of the IRS ruling rather than because of other factors. 426 U.S. at 43. The Court cited previous decisions in which "unadorned speculation" failed to suffice as a basis for standing, including *Warth* v. *Seldin, supra,* in which the Court held that low income persons seeking the invalidation of a town's restrictive zoning ordinance lacked standing because they failed to show that the alleged injury (inability to

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__R.I.__ (1982) for the proposition that "concrete adversity" exists in this case sufficient to confer standing. Petitioners misapprehend the holding of *Blackstone Valley* in which standing was denied. The R.I. Supreme Court noted that "the essence of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to insure concrete adverseness that sharpens the presentation of issues upon which the court depends for an illumination of the questions presented," 452 A.2d at 932-933.

13. As in *Simon,* the Petitioners here sought to maintain this action as a class action, although no class was ever certified below. Even if this suit was a class action, it makes no difference to the question of standing, "for even named plaintiffs who represent a class must allege and show that they have been personally injured." *Warth* v. *Seldin, supra,* 422 U.S. at 502. In class actions, injury to particular members is required. *U.S.* v. *SCRAP,* 412 U.S. 669 (1973).

obtain affordable housing) was attributable to the challenged ordinance instead of to other factors.[14]

A similarly speculative "injury" was determined to be insufficient to confer standing by the First Circuit in the case of *Munoz-Mendoza* v. *Pierce*, 711 F.2d 421 (1st. Cir. 1983), in which a Chinatown neighborhood association in Boston challenged a decision by the Department of Housing and Urban Development to award an "Urban Development Action Grant" (UDAG) to the city to develop the Copley Plaza commercial complex. The neighborhood association argued that "injury in fact" arose from the risk of increased rents which could result from the development of the Copley Plaza complex, leading to the displacement of the plaintiffs from their neighborhoods.

The First Circuit rejected standing on this basis: "Given the uncertainty as to whether any individual will have to pay increased rent or be displaced, and the much greater uncertainty about whether the same result would have occurred in the absence of the UDAG, this case involves just as much speculation as *Simon*," 711 F.2d at 426. (Significantly, the First Circuit upheld standing on the basis of the plaintiffs' claim that the UDAG would increase racial segregation in neighborhoods; the Court reasoned that deprivation of the advantages of living in an integrated community is sufficient to satisfy the constitutional standing requirement.)[15] There are no racial segregation issues in this case, or other issues which are even arguably within the

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14. The Court's language in *Seldin*, quoted by the Court in the *Simon* decision, is directly applicable to this petition; the *Seldin* Court noted that the plaintiffs relied "on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had (defendants) acted otherwise, and might improve were the Court to afford relief." 422 U.S. at 507. To this one might add the Court's statement in *Valley Forge Christian College* that "the federal courts were simply not constituted as ombudsmen of the general welfare." 454 U.S. at 487.

15. The Supreme Court has recognized that the denial of an opportunity to live in an integrated community is injury sufficient to satisfy the constitutional requirements of standing; in particular, the Court has recognized that injury is properly alleged when plaintiffs claim a deprivation "of the social and professional benefits of living in an integrated society." *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 111-112. (1979).

zone of interests protected by any statute or constitutional guarantee.[16]

The Petitioners here completely lack any legal or equitable interest in the Lakeside property, and, as bystanders and members of a neighborhood association, they allege a speculative injury similar to the risk of increased rents and displacement which was rejected as a basis for standing in *Pierce*. The causal linkage involved here—from the sale of the Lakeside property by CF&S to the respondent Sherry, to the conveyance from respondent Sherry to respondent R & F Associates, to the development of the Lakeside property consistent with the applicable zoning and land use controls, to the eventual erosion of property values—is too speculative to constitute direct and palpable injury for standing purposes.[17] Any conceivable "injury" stemming from the loss of what the Petitioners characterize as an "environmental oasis" is a chimera; the Lakeside property is not a park or playground, and the property has never been used as such by the Petitioners or any members of the general public.

Accordingly, the Petition for Writ of Certiorari must be denied because the Petitioners have failed to demonstrate that they meet any of the constitutional elements for standing to maintain this action.

B. Petitioners' Lack of Standing to Enforce Charitable Trust

As discussed in the argument relating to Summary Judgment, the R.I. Superior Court correctly determined, on the basis of the

16. The Petitioners have also failed to properly allege any injury to aesthetic and "environmental well-being" as applied by the Supreme Court in relation to lawsuits under Section 10 of the Administrative Procedures Act, 5 U.S.C. Sec. 702, such as *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). Aesthetic and environmental well-being are "cognizable interests" sufficient to lay the basis for standing under Section 10 of the APA, "[B]ut the injury in fact test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." 405 U.S. at 734-735. The Petitioners' attempt to place themselves in the posture of the plaintiffs in *Sierra Club* v. *Morton* misses the mark; in *Morton*, the subject property was public land devoted to recreational purposes such as hiking, camping and fishing.

17. One may equally speculate that adjoining property values may be increased, or be totally unaffected, by any future development of the Lakeside property.

undisputed state of the record title, that the Lakeside property is not held in trust.

Even if the Lakeside property was held in trust, however, the Petitioners lack standing to maintain an action to enforce the terms of a charitable trust.

It is well settled that a suit for the enforcement of a charitable trust can be maintained only by the State Attorney General or other public officer (as the representative of the public), or by a co-trustee, or by a person who has a special interest in the enforcement of the charitable trust, but not by persons lacking a special interest in the charitable trust who are merely members of the public at large, or taxpayers, or even potential beneficiaries of a charitable trust. 15 Am. Jur. 2d *Charities*, Sec. 143 (1976).

It has long been recognized at common law that the Attorney General has the duty of representing the public interest in securing the enforcement of charitable trusts. The source of this power was discussed by 3 Blackstone, *Commentaries* 427 as being based on the premise that:

> The king, as *parens patriae*, has the general superintendence of all charities; which he exercises by the keeper of his conscience, the chancellor.

The rationale for vesting in the Attorney General the exclusive power to begin proceedings to enforce charitable trusts is apparent. The persons affected by such trusts are usually some or all of the members of a large and shifting class of the public. Many times no specific individual can prove that he will necessarily benefit from the charity. All may be prospective or possible beneficiaries, but no one can be determined to be a certain recipient.

The Petitioners make the absurd assertion that the R.I. Supreme Court carved out a new rule denying Petitioners standing and applied it retroactively (page 2, Petition). Rhode Island has adhered to the general rule regarding the enforcement of charitable trusts since at least 1905, when the R.I. Supreme Court decided *Stearns* v. *The Newport Hospital*, 62 A.132, 27 R.I. 308 (1905), which involved a petition for an accounting of trust assets. Explicitly rejecting the notion that taxpayers have standing in such cases, the R.I. Supreme Court in *Stearns*

described the responsibility of enforcing charitable trusts as follows: "The trust is a public one, and the Attorney General is the proper person to represent the public in any judicial inquiry into the conduct of the trustee in administering it." 27 R.I. at 316.

Far from enunciating a new rule of standing, the R.I. Supreme Court merely applied the general rule that has been consistently followed since at least 1905. The Petitioners cite four Rhode Island cases as standing for the proposition that the Attorney General is not the sole person who may bring suit to enforce charitable trust duties. The Petitioners have misled the Court by seriously mischaracterizing the holdings of these cases. *Newport Hospital* v. *Harvey*, 133 A. 648, 47 R.I. 382 (1926), the first case cited by the Petitioners, was a suit for specific enforcement of a purchase agreement involving land owned by a charitable trust. The action was not to enforce a charitable trust and the court simply noted that because the land in question is held by a charitable trust, the Attorney General should be a party to the proceedings.

The second case cited by the Petitioners is *Powers* v. *Home for Aged Women*, 179 A. 610, 55 R.I. 187 (1935), which involved a suit by a trustee for construction of a will making a series of bequests to charitable corporations. The court recites that:

> It is well settled in this state and elsewhere that the attorney general is the representative of the interests of beneficiaries and the public under charitable trusts and bequests for charitable uses and that he should be made a party in any suit in which the existence or the validity of such a trust or such a bequest is really in question or the administration of such a trust is involved,".

Id. at 192.

Any fair reading of *Powers* would underscore its congruence with *Stearns* v. *The Newport Hospital, supra.*

A similar decision is *Leo* v. *Armington*, 59 A.2d 371, 74 R.I. 124 (1948) the third case cited by the Petitioners, which holds that where suit is brought by the trustees for instructions, or where suit is brought by others having a special interest in a charitable trust, the Attorney General is a necessary party.

The final case cited by the Petitioners is *Israel* v. *National Board of Y.M.C.A.*, 369 A.2d 646, 117 R.I. 614 (1977), a matter

in which the Attorney General sought to enjoin the diversion of trust funds from a Rhode Island estate. The opinion quotes language from the earlier decisions in *Powers* and *Armington* to the effect that the Attorney General should be a party in any suit in which the existence or the validity of such a trust or such a bequest is really in question, referring to actions instituted by trustees or others with a special interest in the charitable trust, but the court clearly states that the Attorney General has the sole authority under common law to enforce, on behalf of the public, the provisions of charitable trusts affecting Rhode Island interests. "Thus, the Attorney General of Rhode Island has the power and authority under common law to enforce the provisions of charitable trusts affecting Rhode Island interests." 369 A.2d at 649.

The cases cited by the Petitioners do not stand for the proposition asserted in their petition, rather they merely reflect the well recognized exceptions to the common law rule that the Attorney General alone has the power to maintain suits for the enforcement of charitable trusts.

It is well settled in Rhode Island and elsewhere that where a person having a special interest in the performance of a charitable trust brings suit for the enforcement of the trust, the Attorney General is a necessary party to the suit, since his presence is necessary for the protection of the interests of the community in the performance of the trust.

A person who has a special interest in the performance of a charitable trust can maintain a suit for its enforcement, but he must show that he is entitled to receive a benefit under the trust that is not merely the benefit to which members of the public in general are entitled. *Hardman* v. *Feinstein,* 240 Cal. Rptr. 483, 485 (Cal. App.1 Dist. Ct. 1987); *Clevenger* v. *Rio Farms,* 204 S.W. 2d 40 (Tex. Civ. App., 1947); *Schaeffer* v. *Newberry,* 35 N.W. 2d 287, 227 Minn. 259 (1948).

A person who has no interest in the performance of the trust, other than as a member of the community, cannot maintain a suit for the enforcement of the trust. *Coffee* v. *William Marsh Rice University,* 403 S.W. 2d 340 (Tex., 1966), III Scott *Trusts*, Sec. 391, p. 2054 (3rd ed. 1967). He may, if he can, induce the Attorney General to bring a suit, and the Attorney General may,

if he chooses, bring the suit only if the complaining party is willing to act as relator and assume responsibility for the payment of costs.[18] But a third person who has no special interest cannot himself maintain the suit.

The Petition for Writ of Certiorari must be denied because, even if a question of trust status existed in this case, the Petitioners, who have no special interest in the Lakeside property, lack standing to maintain an action for the enforcement of a charitable trust.

III.

GRANTING OF MOTION FOR SUMMARY JUDGMENT BELOW WAS PROPER

The R.I. Superior Court correctly granted the Motion for Summary Judgment, and the judgment was properly affirmed by the R.I. Supreme Court.

The essence of the Petitioners' claim is that CF&S breached the terms of the charitable trust by which it holds title to the Lakeside property by conveying the property to a third party without the permission of, or notice to, the court or the Attorney General; the gravamen of the Petitioners' claim is their contention that CF&S should have petitioned the court for a *cy pres* proceeding instead of conveying the property to a third party.

The Petitioners' claim is entirely based on the mistaken assumption that the Lakeside property is held by CF&S in trust. This assumption is completely unsupported by the facts surrounding the original conveyances to the predecessor charity, Family Service, Inc., which amply demonstrate that the deeds and chain of title into Family Service, Inc., are in fee simple without reference to any conditions. Despite the state of the record title, the Petitioners assert that it was error for the R.I. Superior Court to grant a Summary Judgment Motion where there were mixed questions of law and fact relating to the trust nature of the property.

The determination of whether a trust exists is clearly a legal question for the court and one that is appropriately within the scope of a summary judgment motion. The R.I. Superior Court,

18. In this matter, the Rhode Island Attorney General, as the record below indicates, declined to permit the Petitioners to institute suit as relators.

in deciding the Summary Judgment Motion, possessed conclusive evidence of the lack of any intention in the original deeds to convey the Lakeside property in trust.

Section 18-9-4 of the Rhode Island General Laws (1985 Reenactment) defines a charitable trust as "any fiduciary relationship with respect to property arising as the result of an intention to create it and subject the person by whom the property is held to equitable duties to deal with the property for charitable, educational, or religious purposes."

The donor's intent, therefore, is crucial in determining whether property is held in trust. The Petitioners have relied heavily on the erroneous conclusion that any gift to a charitable corporation implies that the gift is impressed with a trust, thereby confusing the important distinction between an unconditional gift to a charitable corporation and a gift in trust to a charitable corporation.

A gift to a charitable corporation does not imply that the gift is impressed with a trust, IV Scott *Trusts*, Sec. 348.1 (3rd ed., 1967). A number of Rhode Island cases have held that a bequest or gift to a charitable organization does not necessarily imply that the gift is impressed with a trust, *Guild* v. *Allen*, 67 A. 855, 857, 28 R.I. 430 (1907); *Rhode Island Hospital Trust* v. *Williams*, 148 A. 189, 50 R.I. 385 (1929); *Israel* v. *National Board of Y.M.C.A.*, 369 A.2d 646, 684, 117 R.I. 624 (1977). Instead, a donor can make an absolute and unconditonal gift to a charitable organization with the expectation that the gift will be used to promote a general charitable purpose, *Guild*. 67 A. at 857.

In this case, the two parcels of land originally conveyed to the Providence Society for Organizing Charity were absolute and unconditional gifts. Both the 1912 deed from William Faunce (R.A-1) and the 1916 deed from Patrick Fitzpatrick (R.A-2) were devoid of any granting language expressing an intent to impress a trust upon the property. The Fitzpatrick deed clearly states that the property is conveyed to the Providence Society for Organizing Charity in fee simple.

The Petitioners also allege that it was error for the R.I. Superior Court to grant Summary Judgment where there was a mixed question of law and fact concerning the 1951 proceeding in which

title to the Lakeside property was transferred from Friends Service, Inc. to CF&S.[19]

Again, the determination of whether the Lakeside property was held in trust at the time of the 1951 proceeding is strictly a legal question, and the R.I. Superior Court had ample evidence before it concerning the state of the record title in 1951.

When Family Service, Inc., the predecessor charity, petitioned the R.I. Superior Court to approve a transfer of the property to CF&S in 1951, it explicitly stated in its Complaint that neither parcel of property originally conveyed to Friends Service, Inc. in

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19. The Petitioners' assertions of plain error below are substantively without merit. Petitioners appear to suggest that the Superior Court's denial of Respondents' Motion to Dismiss is *res judicata* on the issue of Petitioners' claim of standing. *Res judicata* prevents the relitigation of factual questions or legal issues decided in previous litigation. See *generally* 18 C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure*, Sec. 4401 *et seq.* (1981). The doctrine of *res judicata* bars a later suit when the first suit (1) results in a final judgment on the merits, (2) the first suit was based on proper jurisdiction, (3) both suits involved the same cause of action, and (4) both suits involved the same parties and their privies. *Lovell* v. *Mixon*, 719 F.2d 1373 (8th Cir. 1983). Petitioners do not satisfy the requisite elements of the doctrine and therefore its assertion in this case is without merit.

By contrast, law of the case ordinarily precludes a court from re-examining an issue previously decided by the same court in the same case. The laws of the case doctrine does not, however, foreclose reconsideration of subject matter jurisdiction. *Amen* v. *City of Dearborn*, 718 F.2d 789 (6th Cir. 1983). Therefore, a review of Petitioners standing at the summary judgment stage and appellate stage was perfectly tenable and appropriate, particularly since the standing decision Petitioners rely on came during a Motion to Dismiss, which is evaluated solely from the face of the complaint.

The Rhode Island Supreme Court has noted in *Taveira* v. *Solomon*, 528 A.2d 1105, ___ R.I. ___ (1987), that:

> "The doctrine of the law of the case, while certainly a practice generally to be followed, should not be used to perpetrate clear error flowing from an early erroneous ruling."

See 1B Moore's *Federal Practice* para. 0.404(1) at 123-24 (2d ed. 1984).

> "In sum, the doctrine of the law of the case as applied to successive prejudgments of the trial court, is not a rule to perpetuate error and does not require a court to enter an erroneous judgment because the logic of an earlier erroneous ruling would require it. It is merely a practice that protects the ability of the court to build its final judgment by cumulative rulings, with reconsideration or review postponed until after the judgment is entered."

1912 and 1916 was impressed with a trust. The 1951 R.I. Superior Court decree which approved the conveyance to CF&S recognized the state of the record title and authorized the Lakeside property to be conveyed to CF&S "for its general uses and purposes," the classic language for creating a fee simple property interest. See R.A-4 (1951 Superior Court Decree). As suggested by the language of the 1951 Bill of Complaint, the entire *cy pres* proceeding was unwarranted and unnecessary, because the Lakeside property was never held in trust. The deeds and chain of title of both CF&S and its predecessor in title are in fee simple without reference to and any conditions other than general charitable uses and purposes. See R.A-5 (1951 Deed from Family Service, Inc. to CF&S). Thus, when CF&S sold the Lakeside property to a third party, it was not in breach of any charitable trust. The R.I. Superior Court correctly granted Summary Judgment based upon the undisputed state of the record title.

Moreover, CF&S, as a non-profit charitable corporation, did not need the approval of the Rhode Island legislature to sell the Lakeside property. A 1984 amendment to the Rhode Island statute allowing charitable corporations to own and convey property provides authority "To purchase, take, receive, lease, take by gift, devise or bequest or otherwise acquire, own, hold, improve, use and otherwise deal in and with real or personal property or any interest herein, wherever situated without restriction as to amount." (Title 7, Chapter 6, Section 5, Subsection 4, Rhode Island General Laws, 1985 Reenactment). Subsection 5 of the same statute provides authority for charitable corporations "To sell, convey, mortgage, pledge, lease, exchange, transfer, and otherwise dispose of all or any part of its property and assets." Thus, the action of CF&S in changing the form of one of its assets was proper pursuant to the authority granted to it as a charitable organization by the State of Rhode Island.

Moreover, the doctrine of *cy pres* is completely inapplicable to the facts in this case. The doctrine of *cy pres* applies where property is given by a donor in trust for a particular charitable purpose and that particular charitable purpose fails or can no longer be carried out. Bogert, *Law of Trusts,* Sec. 147 (Power of Court to Alter Charitable Trusts—Cy Pres Doctrine) (5th ed., 1973). In this situation, the court will ordinarily direct that the

property be given to another charitable organization to carry out a similar charitable purpose or permit the original donee to use it for a similar charitable purpose, IV Scott *Trusts*, Sec. 399 (3rd ed., 1967).

Rhode Island has codified the doctrine of *cy pres* in Section 18-4-1 of the Rhode Island General Laws (1985 Reenactment) which states that *cy pres* is applicable where "the purposes of the donor cannot be literally carried into effect."[20] In this situation, the statute recites, "A complaint may be filed for a *cy pres* application of trust property; and thereupon all such proceedings . . . shall be had and taken in said suit, to carry out the intents of the donor as near as may be, that such charity may not fail," Section 18-4-1 R.I. General Laws (1985 Reenactment) (emphasis added).[21]

As stated in Bogert and Scott as well as the Rhode Island statute, *cy pres* is applicable only in the situation where the charitable purpose and thus the charity itself has failed. The *cy pres* doctrine does not apply where the gift, whether in trust or fee simple, is no longer suitable for use and the charity desires to convert the form of its assets and then use the proceeds of the sale to carry out the charitable intentions of the donor. An illustration of this basic doctrine, involving a charitable trust and a gift in fee simple, is *Town of South Kingston* v. *Wakefield Trust Co.*, 134 A. 815, 48 R.I. 127 (1926). In *Wakefield Trust Co.*, the R.I. Supreme Court held that the *cy pres* doctrine was inapplicable because the charity itself and its charitable purpose had not failed. After years of use, the area surrounding the site of the property became highly developed and was no longer a suitable location for a public school, at which point the town sold the

20. A copy of the Rhode Island *cy pres* statute is attached hereto as R.A-8.

21. The reference by the Petitioners to "[t]he continuing jurisdiction which courts exercise over charitable gifts, especially after *cy pres* has been successfully invoked by the initial donee. . ." (page 24, Petition) completely misstates both *cy pres* doctrine and the court record. The 1951 Rhode Island Superior Court Decree R.A-4) recognized that the original conveyances to Family Services, Inc. were not made in trust. But even if the Lakeside property were held in trust, the Petitioners' reference to "[t]he continuing jurisdiction which courts exercise over charitable gifts" is incorrect. *Cy pres* jurisdiction does not go on forever. The Petitioners appear to be referring to "prerogative *cy pres*," which exists only in England, where it is exercised "comparatively rarely." Bogert, *Law of Trusts*, Sec. 147, p. 525 (5th ed., 1973).

property to a third party. The Court held that *cy pres* was inapplicable because the purpose of the charitable trust had not failed, because the proceeds of the sale could be used to carry out the charitable intention of the donor.

In this matter, unlike *Wakefield Trust Co.*, the property in question is held in fee simple and not as a charitable trust, however, the applicable *cy pres* principle is the same: the doctrine does not apply because CF&S can still carry out the donor's charitable purpose by using the proceeds from the Lakeside sale to benefit children.[22] CF&S has not gone out of business or in any way ceased to fulfill its general charitable purposes of aiding children; it is merely using the proceeds of the sale of one of its assets, namely the Lakeside property, for its ongoing general charitable purposes. The condition precedent for invoking the doctrine of *cy pres*, namely the failure of the charitable purpose, is absent in this matter, and thus, the *cy pres* doctrine is inapplicable whether the Lakeside property is held in trust or in fee simple.[23]

The Petition for Writ of Certiorari must be denied because the granting of Summary Judgment by the R.I. Superior Court, and

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22. CF&S is also not required to obtain the permission of the court to sell the Lakeside property under a Rhode Island statute which allows a trustee to petition the court for instructions before selling real property held pursuant to trust. Section 18-4-1 of the R.I. General Laws (1985 Reenactment) provides that "whenever the sale, exchange, conveyance or leasing of the whole or of any part or parts of any property held upon trust, the R.I. Superior Court, upon complaint, brought by any trustee of any such property, may authorize one or more of such transactions as may appear necessary or expedient." CF&S is not subject to the provisions of this section because the Lakeside property is not held in trust. Even if the property was held in trust, the Rhode Island statute is not mandatory; it merely allows the trustee to petition the court for approval when the trustee is unsure whether the sale of trust assets is appropriate according to the terms of the trust.

23. The Petitioners assert, on page 22 of their Petition for Writ of Certiorari that, "CF&S made repeated admissions of trust title in its August 1987 memorandum" (supporting the CF&S Motion to Dismiss). This assertion is completely false; the Respondents, for purposes of supporting a motion to dismiss for failure to state a claim upon which relief can be granted, must accept as true all material allegations of the complaint. Only for purposes of supporting the Motion to Dismiss did the Respondents "accept" the allegations in the complaint as "true." CF&S's denial of trust title has been consistent throughout entire proceeding.

the affirmance of that judgment by the R.I. Supreme Court, was correct based upon undisputed facts and legal questions which were properly resolved by the trial justice.

IV.

"FINDING" OR "OPINION" BY THE RHODE ISLAND ATTORNEY GENERAL

The Petitioners repeatedly refer to the weight given by the R.I. Supreme Court to the purported "opinion" or "finding" made by the Rhode Island Department of Attorney General with respect to the sale of the Lakeside property by CF&S. The Petitioners assert that they were given no advance notification of the so-called "opinion" of the Rhode Island Attorney General, until it was referred to during oral argument before the R.I. Supreme Court on February 13, 1989.

The Petitioners have made seriously misleading statements to this Court in their characterization of the role of the Rhode Island Department of Attorney General in this case. The Petitioners' headnote for this point disingenuously states the following as a reason for granting the Writ: "Reliance on an Unpublished, Non-record Attorney General's Opinion as Patently Untenable." There is no written or oral opinion by the Attorney General for the simple reason that the Attorney General never rendered any opinion or finding.

The position of the Rhode Island Department of Attorney General has been consistent throughout this case, and that position remains the determination that this matter is a private legal dispute which has no relationship to the Attorney General's preclusive role to enforce charitable trusts. That position was first taken by a representative of the Attorney General at the June 13, 1988 hearing on the Motion to Dismiss.[24] The existence of

24. This was the first public position taken by the Attorney General. Prior to the conveyance by CF&S to respondent Sherry, CF&S informally advised the Attorney General of the impending sale; the Attorney General indicated he had no objection. Similarly, the Petitioners had approached the Attorney General to inquire if the Attorney General would initiate a *cy pres* proceeding or, alternatively, if the Petitioners could institute an action, as relators, in the name of the state. The Attorney General declined the Petitioners' request; thus, the Petitioners were aware of the Attorney General's position in the matter even before commencing their lawsuit.

the position of the R.I. Attorney General did not first "surface" on February 13, 1989 as the Petitioners allege. The Petitioners attempt to seriously mislead the Court by implying that the position of the Department of Attorney General was based on an opinion or finding which they were entitled to discover, when in fact the Petitioners had been personally advised of the Attorney General's position on this matter in a meeting requested by their own representatives, prior to commencement of this action. The Attorney General does not render opinions or findings on matters outside his jurisdiction.

The Department of Attorney General never formally determined that there was no objection to the sale of the Lakeside property for the simple reason that there was never any necessity for the Attorney General to render an opinion. There is no "opinion" or "finding" for the Petitioners to discover. Had the Lakeside property in fact been held in trust, then clearly the Rhode Island Attorney General was the only party who could have initiated legal action to enforce the charitable trust on behalf of the public, *Stearns* v. *The Newport Hospital, supra; Israel* v. *National Board of Y.M.C.A., supra.* The Lakeside property was held in fee simple without any restrictions, and, therefore, there was never any charitable trust which the Attorney General could seek to enforce. Moreover, the doctrine of *cy pres* is inapplicable because there has not been any failure of a charitable trust such that the courts must ascertain the purposes of the settlor in order to effectuate the trust purposes, see, generally, Bogert, *Law of Trusts,* Sec. 147 (Power of Court to Alter Charitable Trusts—Cy Pres Doctrine) (5th ed., 1973).

The Petitioners state that "the Attorney General was given no advance notice of the proposed sale" (page 22, Petition), when in fact there could not have been any conceivable requirement for advance notification of the sale of private property.[25] Section 18-19-5 of the R.I. General Laws requires that "[t]he Attorney General shall be notified of all judicial proceedings involving

25. In fact, as discussed in footnote 24 above, the Attorney General had been informally advised of the impending conveyance from CF&S to the respondent Sherry.

charitable trusts affecting or in any manner dealing with, a charitable trust." This statute, however, applies only to judicial proceedings, not to every sale of property or discretionary action that a charitable organization takes.

The Petitioners refer to six "declarations" and "opinions" which were part of the record or contained in the case law, and which "the Rhode Island Court ignored." The Petitioners' characterization of these matters is grossly misleading and often simply erroneous. There was never any special "board of trustees" appointed by the Providence Society for Organizing Charity to oversee the management of the Lakeside property.

The 1936 opinion of the attorney, George H. Huddy, Jr., was not part of the record below and would clearly have been inadmissible in any circumstances. Neither is there any evidentiary significance to what the Petitioners refer to as "the echoing Society declaration" of 1946 of the then President of the Providence Society for Organizing Charity. Whatever the predecessor charity did with respect to the Lakeside property is not binding on CF&S, a separate entity, which received the property in 1951 "for its general uses and purposes," the classic language used to create a fee simple. The statements contained in memoranda prepared after the initial conveyance to Friends Service, Inc. are of no evidentiary value in determining the intent of the original donors in 1912 and 1916.

The reference by the Petitioners to *Petition of Downer Home*, 226 N.W. 2d 444, 67 Wis. 2d 55 (1975) (page 24, Petition) is completely inapplicable because the *Downer Home* case involved a specific trust where funds had been gathered for a specific purpose. There has never been any trust in regard to the Lakeside property.

The reference by the Petitioners (page 24, Petition) to "[t]he continuing jurisdiction which courts exercise over charitable gifts, especially after *cy pres* has been successfully invoked by the initial donee. . ." is totally irrelevant and misstates *cy pres* doctrine, as is discussed earlier in this brief.

The "declarations" and "opinions" referred to by the Petitioners are either completely inapposite to this case or constitute hearsay and would be clearly inadmissible had there been a trial of this matter.

Accordingly, the Petitioners' characterization of the position of the Rhode Island Attorney General is inaccurate and misleading, and the statement that the Petitioners were caught by surprise by a reference to an opinion of the State Attorney General, is so erroneous that it should be completely disregarded by the Court.

CONCLUSION

The Petition for Writ of Certiorari is entirely without merit and must be summarily denied. The Petitioners failed to allege any federal questions in the state court proceedings and thus are barred from raising them for the first time in the Supreme Court. Furthermore, the Supreme Court lacks jurisdiction in this matter because there are no federal questions properly presented to the Court, nor are there any constitutional issues raised by the Petition.

The question of standing is a threshold barrier which the Petitioners cannot surmount in this case. The "injury" that is alleged is so abstract and speculative that it must fail even under the most expansive interpretations of the "injury in fact" requirement for standing. Failing to meet the threshold constitutional requirements for standing, the only way the Petitioners could successfully maintain this action would be if the Lakeside property was a charitable trust and the Petitioners had a special interest in the trust sufficient to confer standing. In fact, the Lakeside property, as correctly determined by the Rhode Island courts, is not a charitable trust. But, even if it were, the Petitioners could not maintain this action because they lack any special interest in the trust other than as taxpayers or members of the community at large, a generalized interest which is insufficient to confer standing to maintain an action for enforcement of a charitable trust.

The granting of summary judgment by the trial court, and the affirmance of that judgment by the R.I. Supreme Court, was entirely proper in light of the undisputed factual record. Both of the deeds from the original grantors were devoid of any language expressing an intent to impress a trust upon the Lakeside property. The 1951 R.I. Superior Court decree explicitly recognized the absence of any trust, and ordered the Lakeside property to be conveyed to CF&S for its general uses and purposes. The only matters for the trial court to decide involved questions of state law

regarding the inapplicability of the *cy pres* doctrine and all such issues were correctly resolved.

Lastly, the R.I. Supreme Court did not improperly rely on any previously unknown "opinion" or "finding" of the State Attorney General. The position of the Rhode Island Attorney General regarding this case was consistent throughout the entire proceeding and well known to the Petitioners from the outset.

For the foregoing reasons, the Petition for Writ of Certiorari must be summarily denied.

Respectfully submitted,

JAMES H. FALK, SR.
Counsel of Record

CHARLES J. MCGOVERN
BRADFORD A. PENNEY
COFFEY, MCGOVERN AND NOEL LTD.
Counsel for Respondents

August 9, 1989

APPENDIX

R.A-1
(Original)

JENNIE A. SENERCHIA
CITY CLERK
(401) 738-2000

FRANCIS X. FLAHERTY
MAYOR

CITY OF WARWICK
OFFICE OF THE CITY CLERK
3275 POST ROAD
WARWICK, RHODE ISLAND 02886

AUG 1 19[illegible]

This is a True Copy of a/an Deed
recorded in the records of Land Evidence in the Office of the
City Clerk, City of Warwick, State of Rhode Island
in Book 72 at Page 115.

Attest: Jennie A. Senerchia
Warwick City Clerk

Know all Men by these Presents,

That certain estate situated on Rocky Point Road, in the Town of Warwick, County of Kent and State of Rhode Island, known as "Lake View Hotel Property" comprising the land and all buildings and improvements thereon, the said land being described as follows: Beginning at a granite bound set in the west line of the Highway leading from Rocky Point to Providence, thence N 1°16' W bounding, easterly on said Highway three hundred twenty-one and 9/10 (321.9) feet to a stone bound and land now or lately of George H.Kate; thence, N 89°51'W bounding northerly on said George H.Kate land twenty-one hundred and sixty-eight (2168) feet to Great Pond so-called, thence southeasterly bounding on said Brook and Great Pond to land now or lately of Isabel M.Colburn, thence north 89°15'E bounding southerly on said Colburn's land seventeen and 9/10 (17.9) feet to a granite bound; thence in the same line eleven hundred and forty-one and 1/10 (1141.1) feet to the first mentioned bound, containing fifteen acres, one hundred twenty-six rods, be the same more or less. Being Lot No. 5 (five) on plat entitled "Plat of the Division of Woodland belonging to the Estate of Hon. John H.Sweetman, Deceased, surveyed and platted by Commissioners appointed by the Hon. the Court of Probate of the Town of Warwick, by Robert B.Greene, C.E. Jan. 1869" recorded on page 47 of Book of Plats No. 2 of the land records of said Warwick.

Being the same property conveyed to this grantor by deed from Myrna Dean (Hotel Interiors) Dec. 1913 and recorded in said Town in Deed Book 81, at page 114.

To Have and to Hold,

In Testimony Whereof,

KNOW ALL MEN BY THESE PRESENTS:

THAT *I, William H.P. Faunce of the City of Providence in the State of Rhode Island (single),* hereinafter called the Grantor, in consideration of *the sum of Ten (10) Dollars* to *me* paid by *the Providence Society for Organizing Charity, a corporation established under the laws of the State of Rhode Island and located in the City of Providence therein,* hereinafter called the Grantee, the receipt whereof is hereby acknowledged, do hereby acknowledge, do hereby remise, release, and forever QUITCLAIM unto *it* the said *Providence Society for Organizing Charity, its successors* ~~heirs~~ and assigns forever, all the right, title, interest, property, claim, and demand, which I now have, or of right ought to have, or claim, in and to

That certain estate situated on Rocky Point Road, in the Town of Warwick, County of Kent and State of Rhode Island, known as "Lake View Hotel Property" comprising the land and all buildings and improvements thereon, the said land being described as follows: Beginning at a granite bound set in the west line of the highway leading from Rocky Point to Providence, thence N 1° 14' W bounding easterly on said highway three hundred twenty-one and 5/10 (321.5) feet to a stone bound and land now or lately of George Hoxsie; thence N. 80° 51' W bounding northerly on said George Hoxsie land twenty-one hundred and sixty-eight (2168) feet to Great Pond Brook, thence southeasterly bounding on said Brook and Great Pond to land now or lately of Isabel W. Colburn, thence north 89° 15' E bounding southerly on said Colburn's land seventy-two and 9/10 (72.9) feet to a granite bound; thence in the same line eleven hundred and forty-one and 1/10 (1141.1) feet to the first mentioned bound, containing fifteen acres, one hundred twenty-six rods, be the same more or less, Being Lot No. 5 (five) on plat entitled "Plat of the Division of Woodland belonging to the Estate of Hon. John R. Waterman, deceased, surveyed and platted by Commissioners appointed by the Hon. the Court of Probate of the Town of Warwick, by Robert W. Greene, C.E. Jan. 1883" recorded on page 47 of Book of Plats No. 2 of the land records of said Warwick.

Being the same preoperty conveyed to this grantor by deed from Pyrce Owen dated February 26th 1912 and recorded in said Town in Deed Book 81, at page 444.

TO HAVE AND TO HOLD, the same, with all the rights, privileges and appurtenances thereunto appertaining, unto and to the use of *it* the said *Providence Society for Organizing Charity, its successors* ~~heirs~~ and assigns forever.

And *I* the aforementioned *William H.P. Faunce* for *myself* and for *my* heirs, executors, and administrators, do covenant with the said *Providence Society for Organizing Charity, its successors* ~~heirs~~ and assigns that *I* will warrant and defend the aforedescribed premises unto the said *Providence Society for Organizing Charity, its successors* ~~heirs~~ and

assigns forever, against the lawful claims and demands of all persons claiming by, through or under *me*.

And I, *Sarah E. Faunce* wife of the said *William H.P. Faunce* in consideration of the sum paid as aforesaid, do hereby release and forever quitclaim unto the said *Providence Society for Organizing Charity, its successors* ~~heirs~~ and assigns, all *my* right of *dower* in and to the aforedescribed premises.

IN TESTIMONY WHEREOF, *we* have hereunto set *our* hands and seals this *31st* day of *October* in the year of our Lord one thousand nine hundred ~~and~~ *twelve (1912)*.

Signed and sealed in presence of)
)
Henry Salomon)

William H.P. Faunce

Sarah E. Faunce

State of Rhode Island.

County of Providence. *In Providence on the 31st day of October A.D. 1912 before me personally appeared the above named grantors William H.P. Faunce and Sarah E. Faunce, his wife, both of them to me known and known by me to be the parties executing the foregoing instrument and severally acknowledged said instrument, by them executed, to be their free act and deed.*

Recorded Nov. 4, 1912 at 8 a.m.

Witness

/S/
James T. Lockwood,
Town Clerk

Notary Public

/S/
Henry Salomon,
Notary Public

R.A-2
(Original)

JENNIE A. SENERCHIA
CITY CLERK
(401) 738-2000

CITY OF WARWICK
OFFICE OF THE CITY CLERK
3275 POST ROAD
WARWICK, RHODE ISLAND 02886

AUG 1 1986

This is a True Copy of a re[illegible]
recorded in the records of Land Evidence in the Office of the
City Clerk, City of Warwick, State of Rhode Island
in Book [illegible] at Page [illegible]

Jennie A. Senerchia
CITY CLERK
WARWICK, RHODE ISLAND

Know all Men by these Presents:

That

hereinafter called the Grantor
in consideration of

to paid by
hereinafter called the Grantee the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto the said Grantee and
heirs and assigns forever,

To Have and to Hold, the aforegranted premises, with all the privileges and appurtenances thereunto belonging, unto and to the use of the said Grantee and heirs and assigns forever.

And the said Grantor do hereby for and for heirs, executors and administrators, covenant with the said Grantee and heirs and assigns that lawfully seized in fee simple of the said granted premises; that the same are free from all incumbrances that have good right, full power, and lawful authority to sell and convey the same in manner as aforesaid; that the said Grantee and heirs and assigns shall by these presents at all times hereafter peaceably and quietly have and enjoy the said premises; and that the said Grantor will, and heirs, executors, and administrators shall, warrant and defend the same to the said Grantee and heirs and assigns forever against the lawful claims and demands of all persons.

And for the consideration aforesaid

do hereby release all right of in and to the said granted premises unto the said Grantee and heirs and assigns forever.

In Witness Whereof, have hereunto set hand and seal this day of
in the year of our Lord one thousand nine hundred and

Signed and sealed in presence of

Patrick St. Patrick (L.S.)

Jeremiah Patrick
Town Clerk

KNOW ALL MEN BY THESE PRESENTS:

THAT *I, Patrick Fitzpatrick of the City of Providence in the State of Rhode Island (single),* hereinafter called the Grantor, in consideration of *the sum of Ten (10) Dollars* to *me* paid by *the Providence Society for Organizing Charity, a corporation established under the laws of the State of Rhode Island and located in the City of Providence therein,* hereinafter called the Grantee, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto the said Grantee and *its successors* ~~heirs~~ and assigns forever, *in fee simple*

That tract of land, with buildings and other improvements thereon, situated in the Town of Warwick, at or near the part called Hoxsie and estimated to contain nineteen and ¼ (19¼) acres more or less, bounding easterly on the Road from Old Warwick to Providence four hundred thirty-one (431) feet more or less, southerly on land now or lately of the Grantee (otherwise known as the "Lakeside Sanitorium" land) twenty two hundred (2200) feet more or less westerly on Great Pond Brook so called and northerly on land formerly of Cottrell F. Hoxsie (now or lately of Charles F. Frey) about twenty two hundred (2200) feet more or less.

Being the same tract so located which formerly belonged to John N.O. Hoxsie and was conveyed by the Administratrix of his estate to this Grantor by deed recorded with the land records of said Town in Deed Book 84 at page 252.

TO HAVE AND TO HOLD, the aforegranted premises, with all the privileges and appurtenances thereunto belonging, unto and to the use of said *Grantee,* and *its successors* ~~heirs~~ and assigns forever, *in fee simple.*

And *I* the said Grantor do hereby, for *myself* and for *my* heirs, executors, and administrators, covenants with the said Grantee and *its successors* ~~heirs~~ and assigns that *I am* lawfully seized in fee simple of the said granted premises; that the same are free from all encumbrances that *I* have good right, full power, and lawful authority to sell and convey the same in manner as aforesaid; that the said Grantee and *its successors* ~~heirs~~ and assigns shall by these presents at all times hereafter peaceably and quietly have and enjoy the said premises, and that *I* the said Grantor will, and *my* heirs, executors, and administrators shall warrant and defend the same to the said Grantee and *its successors* ~~heirs~~ and assigns forever against the lawful claims and demands of all persons.

~~And for the consideration aforesaid do hereby release all right of in and to the said granted premises unto said Grantee and heirs and assigns forever.~~

IN WITNESS WHEREOF, *I* have hereunto set *my* hand and seal this *29th* day of *February* in the year of our Lord one thousand nine hundred ~~and~~ *sixteen (1916).*

Signed and sealed in presence of) Patrick Fitzpatrick
)
E. Tudor Gross) U.S. Revenue Stamps for $3.50

State of Rhode Island.

County of Providence. In Providence in said County on the 29th day of February A.D. 1916 before me personally appeared the above named Grantor Patrick Fitzpatrick to me known and known by me to be the party executing the foregoing instrument and acknowledged said instrument by him executed to be his free act and deed.

Recorded Mar. 2, 1916 at 8 a.m.

Witness

/s/
James T. Lockwood,
Town Clerk

Notary Public

/s/
E. Tudor Gross,
Notary Public

STATE OF RHODE ISLAND

PROVIDENCE, Sc. SUPERIOR COURT

FAMILY SERVICE, INC.

-v-

WILLIAM E. POWERS, Attorney General of the State of Rhode Island

21550

BILL OF COMPLAINT

FAMILY SERVICE, INC., a charitable corporation of the State of Rhode Island, located in Providence, in said State, brings this its bill of complaint against WILLIAM E. POWERS, of Cumberland, in said State, as he is Attorney General of the State of Rhode Island, and for cause of complaint says:

1. That the complainant, Family Service, Inc., was created by act of the General Assembly of the State of Rhode Island passed at the January Session 1898, under the name of Providence Society for Organizing Charity, the name of said complainant being changed to Family Welfare Society of Providence by amendment to its charter duly filed in the office of the Secretary of State on December 31, 1924, and again changed to Family Service, Inc. by amendment to said charter duly filed in the office of the Secretary of State on March 29, 1948. Complainant's corporate purpose as stated in its charter is "organizing charitable work, diminishing pauperism, and improving the condition of the poor."

2. That during the year 1912 persons interested in the work of the Providence Society for Organizing Charity, as complainant was then known, caused certain real estate located in the Town, now the City, of Warwick, Rhode Island, to be conveyed to

, Clerk

the complainant, the deed of such conveyance being made by William H. P. Faunce, grantor, dated October 31, 1912, recorded in the Land Records of said Town of Warwick November 4, 1912, in Deed Book 32 at page 113; the premises conveyed by said deed being therein described as follows:

> That certain estate situated on Rocky Point Road, in the Town of Warwick, County of Kent and State of Rhode Island, known as "Lake View Hotel Property," comprising the land and all buildings and improvements thereon, the said land being described as follows:
>
> Beginning at a granite bound set in the west line of the highway leading from Rocky Point to Providence, thence N. 1°, 14' W. bounding easterly on said highway three hundred twenty-one and 5/10 (321.5) feet to a stone bound and land now or lately of George Hoxsie; thence N. 80°, 51' W. bounding northerly on said George Hoxsie land twenty-one hundred and sixty-eight (2168) feet to Great Pond Brook, thence southeasterly bounding on said Brook and Great Pond to land now or lately of Isabel W. Colburn; thence north 89°, 15' E. bounding southerly on said Colburn's land seventy-two and 9/10 (72.9) feet to a granite bound; thence in the same line eleven hundred and forty-one and 1/10 (1141.1) feet to the first mentioned bound, containing fifteen acres, one hundred twenty-six rods, be the same more or less. Being Lot No. 5 (five) on plat entitled "Plat of the Division of Woodland belonging to the Estate of Hon. John R. Waterman, deceased, surveyed and platted by Commissioners appointed by the Hon. the Court of Probate of the Town of Warwick, by Robert W. Greene, C. E. Jan., 1885," recorded on page 47 of Book of Plats No. 2 of the land records of said Warwick.

3. That during the year 1916 persons interested in the work of said Providence Society for Organizing Charity caused certain other real estate located in said Town of Warwick to be conveyed to the complainant, the deed of such conveyance being made by Patrick Fitzpatrick, grantor, dated February 29, 1916, recorded in the Land Records of said Town of Warwick March 2, 1916, in Deed Book 92 at page 60; the premises conveyed by said deed being therein described as follows:

> That tract of land, with buildings and other improvements thereon, situated in the Town of Warwick,

lat or near the part called Hoxsie) and estimated to contain nineteen and 1/4 (19 1/4) acres more or less, bounding easterly on the Road from Old Warwick, to Providence four hundred thirty-one (431) feet more or less; southerly on land now or lately of the Grantee (otherwise known as the "Lakeside Sanitorium" land) twenty-two hundred (2200) feet more or less; westerly on Great Pond Brook so-called and northerly on land formerly of Cottrell F. Hoxsie (now or lately of Charles F. Frey) about twenty-two hundred (2200) feet more or less.

4. That said conveyances to the complainant were not made upon any condition and did not purport to be made upon any trust, but in view of its understanding that many of the persons who contributed the funds necessary to bring about such conveyances were interested in summer camping and similar work for children, complainant, acting through its own committees or divisions, including its committee or division then known as the League for the Suppression of Tuberculosis, used said premises until the year 1918 for summer care of children and the parents of children who were in need of outdoor life but had no transmissible disease. In or about the year 1918 the persons then constituting said League for the Suppression of Tuberculosis were organized as a separate organization under the name Providence Tuberculosis League, and subsequent to 1918 the complainant permitted said premises so conveyed to it (hereinafter sometimes referred to as Lakeside) to be used by said Providence Tuberculosis League for the continued summer care of children, and beginning about 1925 said premises were used by said Providence Tuberculosis League under the provisions of formal leases in which complainant was lessor and Providence Tuberculosis League was lessee, in connection with a program including both summer and all year care of children.

5. That complainant has now been notified by said Providence Tuberculosis League that said League no longer desires

to carry on at said property the work which it has previously carried on, and now proposes to turn over the property heretofore used by it for support of its work at Lakeside to Children's Friend and Service, a charitable corporation of the State of Rhode Island.

6. That complainant's Board of Directors and Board of Real Estate Managers have given careful consideration to the question of the best use to be made of said real estate, having regard to the welfare of the community generally and the carrying out, as near as may be, of the charitable purposes which impelled the contributors above mentioned to bring about the conveyance thereof to the complainant; that the matter has further been considered by the staff and Board of Directors of the Providence Council of Social Agencies and by a special committee appointed by said Council, all of whom have approved the conveyance of said property to Children's Friend and Service, which has for many years been carrying on work with children in this State and which has secured the approval of said Council of Social Agencies to a proposed program under which its administrative officers and the accommodations maintained by it for children will ultimately be centered at Lakeside; that the Board of Directors and Board of Real Estate Managers of complainant, subject to obtaining the authority of this Honorable Court, have approved the conveyance of said Lakeside property to said Children's Friend and Service, to be thereafter held and used by it for its general uses and purposes.

7. That although, as above stated, the conveyances above referred to were not made in trust and no conditions as to the use of or disposal of said Lakeside property were imposed either by the grantors or by the persons who caused said convey-

ances to be made, question may be raised by some person at some future time as to the propriety of the proposed conveyance to Children's Friend and Service.

8. Complainant avers that the only necessary party to this proceeding is the respondent William E. Powers in his capacity as Attorney General representing the people of the State and the public generally, and as such Attorney General charged with general oversight of the administration of charitable trusts.

WHEREFORE, and inasmuch as complainant can have relief only in this Court of Equity, and to the end, therefore, that the respondent may true, direct and perfect answer make to all and singular the matters aforesaid (but not under oath, the benefit of which is hereby expressly waived), and that a decree may be entered authorizing conveyance of said Lakeside property to Children's Friend and Service as above proposed, and that complainant may have such other relief as to this Court shall seem meet and to justice and equity shall appertain;

May it please the Court to grant unto the complainant a writ of subpoena to be directed to said William E. Powers, as he is Attorney General of the State of Rhode Island, commanding him under a certain penalty therein to be named personally to be and appear before this Honorable Court and true, direct and perfect answer make to all and singular the premises, and thereafter to perform and abide by such directions, orders and decrees as to this Court shall seem meet and to equity and good conscience shall appertain.

FAMILY SERVICE, INC.

By _____
President

_____, Clerk

STATE OF RHODE ISLAND

PROVIDENCE, Sc.

In Providence, in said County, on the 14th day of February, A. D. 1951, before me personally appeared Lawrence L. Broughton, who signed the foregoing instrument in behalf of said Family Service, Inc., and made oath that he is President of said Family Service, Inc., and duly authorized to sign said instrument as aforesaid; that the facts stated therein are true, of his own knowledge, except as to those matters which are therein stated to be on information and belief, and as to those matters he believes them to be true.

Arthur E. Erickson
Notary Public

R.A. 4
(Original)

STATE OF RHODE ISLAND
PROVIDENCE, Sc.

SUPERIOR COURT

FAMILY SERVICE, INC.

-v-

Eq. No. 21550

WILLIAM E. POWERS, Attorney General of the State of Rhode Island

K.S

FINAL DECREE

This cause came on to be heard on the bill, answer and proof, and it appearing that conveyance to Children's Friend and Service of the real estate described in the bill of complaint will permit the continued carrying out of the charitable purposes for which said real estate has heretofore been held and used by Family Service, Inc., and is also consistent with the intentions of the persons who caused the conveyance of said real estate to Family Service, Inc., the complainant is hereby authorized to execute and deliver a deed or deeds conveying said real estate to Children's Friend and Service, to be held for its general uses and purposes.

Entered as the decree of Court this 16th day of February, A. D. 1951.

By order,

Enter:
Walsh, P.J.
2/16/51

Stephen Lomanno
Asst. Clerk

STATE OF RHODE ISLAND SUPERIOR COURT

PROVIDENCE, So.

FAMILY SERVICE, INC.	:	
-v-	:	Eq. No. 21550
WILLIAM E. POWERS, Attorney General of the State of Thode Island	:	

FINAL DECREE

This cause came on to be heard on the bill, answer and proof, and it appearing that conveyance to Children's Friend and Service of the real estate described in the bill of complaint will permit the continued carrying out of the charitable purposes for which said real estate has heretofore been held and used by Family Service, Inc., and is also consistent with the intentions of the perseons who caused the conveyance of said real estate to Family Service, Inc., the complainant is hereby authorized to execute and deliver a deed or deeds conveying said real estate to Children's Friend and Service, to be held for its general uses and purposes.

Entered as the decree of Court this *16th* day of February, A.D. 1951.

By order,

Enter:

/s/ Walsh, P.J.
2/6/51

/s/ Stephen (illegible)
Asst. Clerk

R:A-5
(Original)

FRANCIS X. FLAHERTY
MAYOR

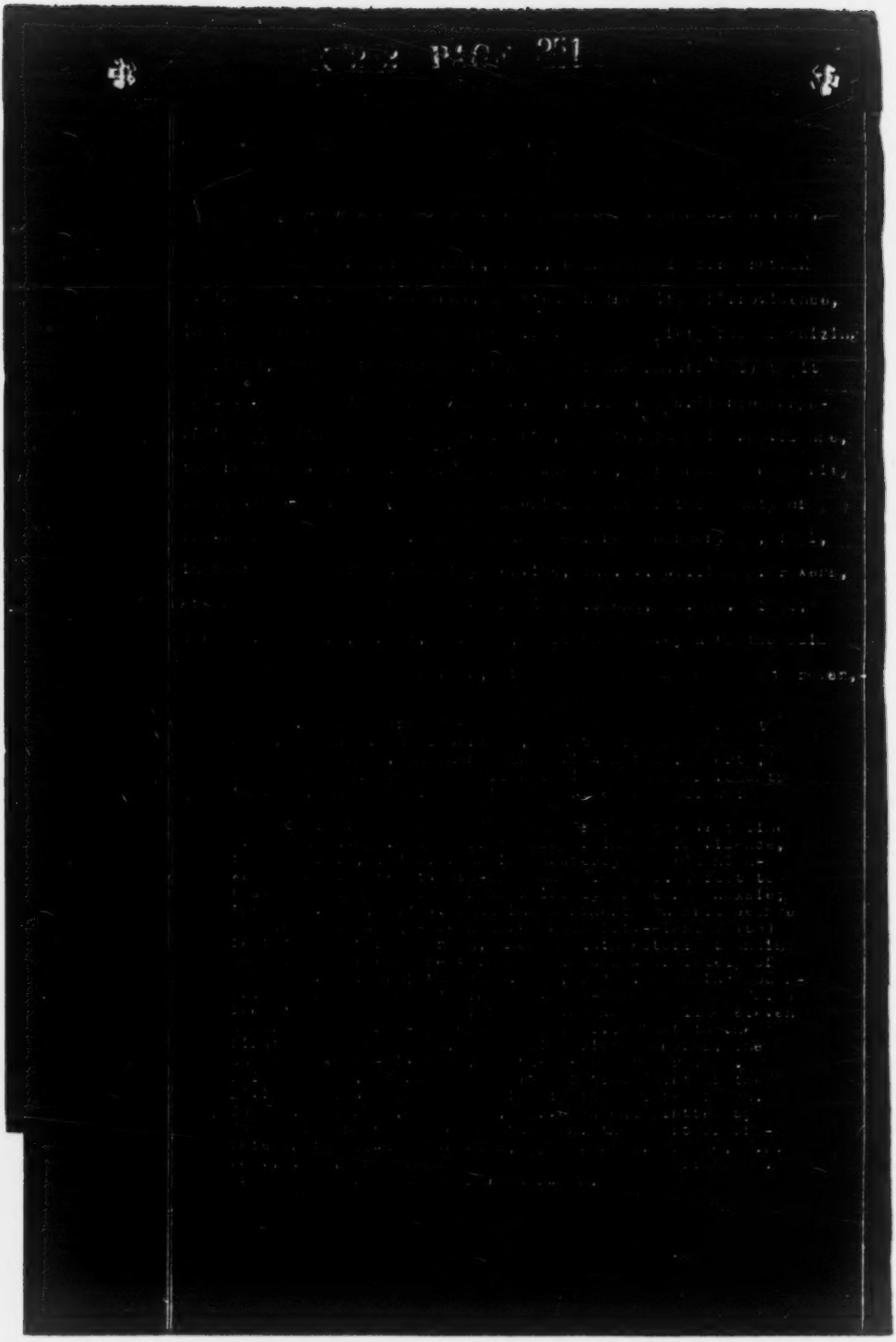
JENNIE A. SENERCHIA
CITY CLERK
(401) 738-2000

CITY OF WARWICK
OFFICE OF THE CITY CLERK
3275 POST ROAD
WARWICK, RHODE ISLAND 02886

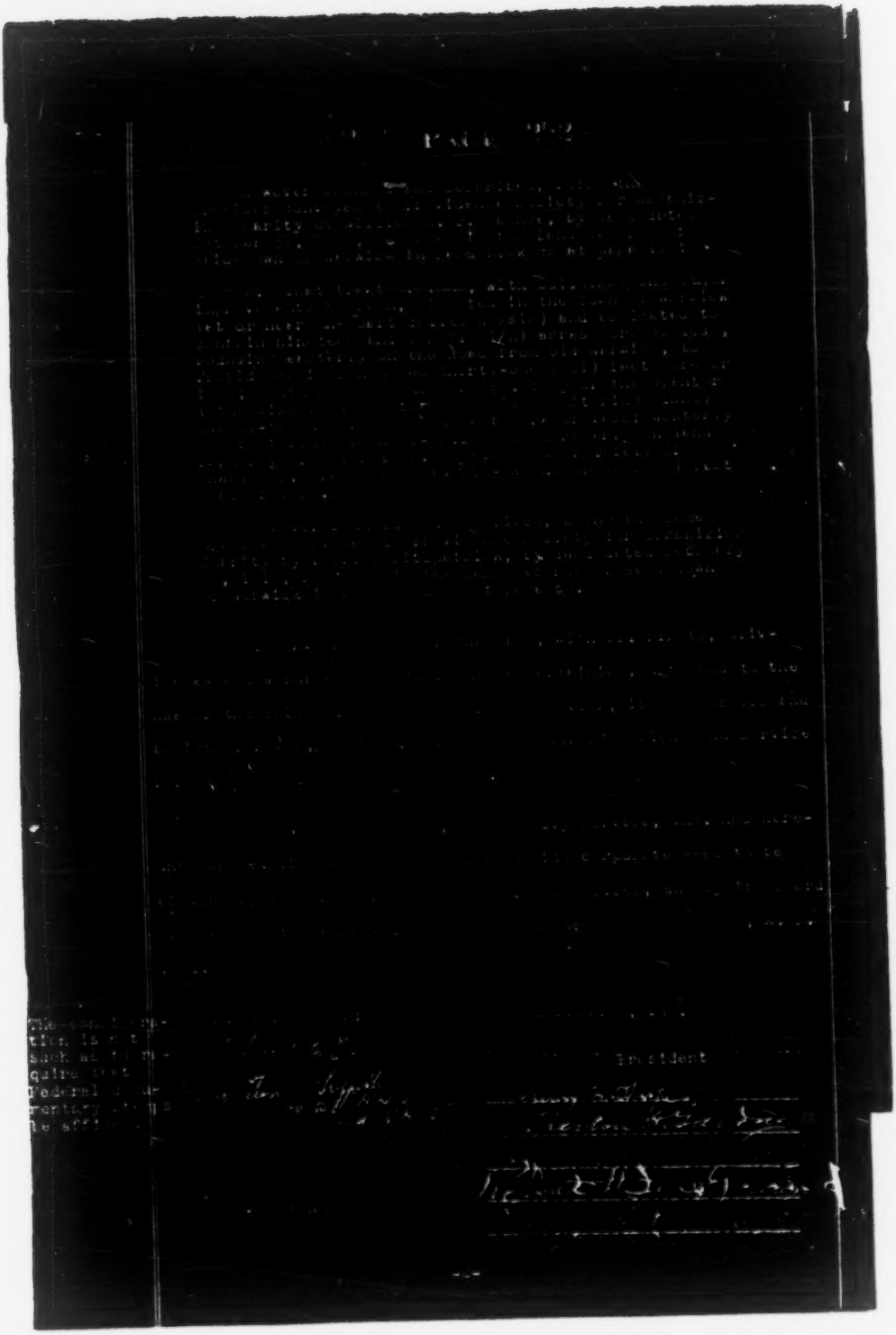
AUG 1 1989

This is a True Copy of a/an Deed
recorded in the records of Land Evidence in the Office of the
City Clerk, City of Warwick, State of Rhode Island
in Book 232 at Page 251.

Attest: Jennie A. Senerchia
Warwick City Clerk



BEST AVAILA



ABLE COPY

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

In Providence, in said County, on the 4th day of April A. D. 1951, before me personally appeared the within named Knowlton E. Knowlton, to me known and known by me to be the President of, and one of the persons executing the foregoing instrument in behalf of, Family Service, Inc., and he acknowledged said instrument by him so executed to be his free act and deed as such President, and the free act and deed of said Family Service, Inc.

Notary Public

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

In Providence, in said County, on the 26th day of March A. D. 1951, before me personally appeared the within named Henry D. Sharpe, to me known and known by me to be one of the persons executing the foregoing instrument in behalf of Family Service, Inc., and he acknowledged said instrument by him so executed to be his free act and deed and the free act and deed of said Family Service, Inc.

Notary Public

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

In Providence, in said County, on the 28th day of March A. D. 1951, before me personally appeared the within named Preston W. Gardner, to me known and known by me to be one of the persons executing the foregoing instrument in behalf of Family Service, Inc., and he acknowledged said instrument by him so executed to be his free act and deed and the free act and deed of said Family Service, Inc.

Notary Public

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

In Providence, in said County, on the 4th day of April A. D. 1951, before me personally appeared the within named Clarence H. Schmidt, to me known and known by me to be one of the persons executing the foregoing instrument in behalf of Family Service, Inc., and he acknowledged said instrument by him so executed to be his free act and deed and the free act and deed of said Family Service, Inc.

Notary Public

BOOK 2 PAGE 251

STATE OF RHODE ISLAND :
COUNTY OF PROVIDENCE

In Providence, in said County, on the 4th day of April A. D. 1951, before me personally appeared the within named [illegible], to me known and known by me to be one of the persons executing the foregoing instrument in behalf of Family Service, Inc., and he acknowledged said instrument by him so executed to be his free act and deed and the free act and deed of said Family Service, Inc.

[illegible]
Notary Public

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

In Providence, in said County, on the 9th day of April A. D. 1951, before me personally appeared the within named [illegible], to me known and known by me to be one of the persons executing the foregoing instrument in behalf of Family Service, Inc., and he acknowledged said instrument by him so executed to be his free act and deed and the free act and deed of said Family Service, Inc.

[illegible]
Notary Public

Recorded Apr. 9 1951 at 9:09 a m

KNOW ALL MEN BY THESE PRESENTS,

That, FAMILY SERVICE, INC., a charitable corporation of the State of Rhode Island, located in the City of Providence, in said State (formerly known as Providence Society for Organizing Charity), in consideration of the sum of One Dollar ($1) to it paid by CHILDREN'S FRIEND AND SERVICE, also a charitable corporation of said State of Rhode Island, located in said Providence, the receipt whereof is hereby acknowledged, pursuant to authority in it vested by decree of the Superior Court of the County of Providence and State of Rhode Island entered February 16, 1951, in that case entitled "Family Service, Inc. v. William E. Powers, Attorney General of the State of Rhode Island, Eq. No. 21550," does hereby give, grant, bargain, sell and convey unto the said CHILDREN'S FRIEND AND SERVICE, its successors and assigns forever,

1. That certain estate situated on Rocky Point Road, in the Town of Warwick, County of Kent and State of Rhode Island, known as "Lake View Hotel Property" comprising the land and all buildings and improvements thereon, the said land being described as follows:

Beginning at a granite bound set in the west line of the highway leading from Rocky Point to Providence, thence N. 1°,14' W bounding easterly on said highway three hundred twenty-one and 5/10 (321.5) feet to a stone bound and land now or lately of George Hoxsie; thence 80° 51' W bounding northerly on said George Hoxsie land twenty-one hundred and sixty-eight (2168) feet to Great Pond Brook, thence southeasterly bounding on said Brook and Great Pond to land now or lately of Isabel W. Colburn, thence north 89° 15' E bounding southerly on said Colburn's land seventy-two and 9/10 (72.9) feet to a granite bound; thence in the same line eleven hundred and forty-one and 1/10 (1141.1) feet to the first mentioned bound, containing fifteen acres, one hundred twenty-six rods, be the same more or less, Being Lot No. 5 (five) on plat entitled "Plat of the Division of Woodland belonging to the Estate of Hon. John R. Waterman, deceased, surveyed and platted by Commissioners appointed by the Hon. the Court of Probate of the Town of Warwick, by Robert W. Greene, C.E. Jan. 1883" recorded on page 47 of Book of Plats No. 2 of the land records of said Warwick.

However bounded and described, being the same premises conveyed to Providence Society for Organizing Charity by William H.P. Faunce, by deed dated October 31, 1912, recorded in the Land Records of said Town of Warwick in Deed Book 82 at page 118.

2. That tract of land, with buildings and other improvements thereon, situated in the Town of Warwick (at or near the part called Hoxsie) and estimated to contain

nineteen and ¼ (19¼) acres more or less, bounding easterly on the Road from old Warwick, to Providence four hundred thirty-one (431) feet more or less; southerly on land now or lately of the Grantor (otherwise known as the "Lakeside Sanitorium" land) twenty-two hundred (2200) feet more or less; westerly on Great Pond Brook so-called and northerly on land formerly of Cottrell F. Hoxsie (now or lately of Charles F. Frey) about twenty-two hundred (2200) feet more or less.

However bounded and described, being the same premises conveyed to Providence Society for Organizing Charity by Patrick Fitzpatrick, by deed dated February 29, 1916, recorded in the Land Records of said Town of Warwick in Deed Book 92 at page 60.

TO HAVE AND TO HOLD, the same, with all rights, privileges and appurtenances thereunto appertaining, unto and to the use of the said CHILDREN'S FRIEND AND SERVICE, its successors and assigns forever, to be held by said Children's Friend and Service for its general uses and purposes.

IN WITNESS WHEREOF, said Family Service, Inc. has hereunto caused its name to be signed and its corporate seal to be affixed by its officer thereunto duly authorized, and by its Board of Real Estate Managers, this *28th* day of *March*, A.D. 1951.

In presence of:

FAMLY SERVICE, INC.

By: /s/ Lauriston E. Knowlton
President

The consideration is not such as to require that Federal documentary stamps be affixed.

Board of Real Estate Managers

/s/ Henry D. Sharp

/s/ Preston H. Gardner

/s/ Clarence H. Philbrick

/s/ Robert H.Ives Goddard

/s/ George H. Huddy, Jr.

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

In Providence, in said County, on the *4th* day of *April* A.D. 1951, before me personally appeared the within named *Lauriston E. Knowlton*, to me known and known by me to be the *President*, of, and one of the persons executing the foregoing instrument in behalf of, Family Service, Inc., and he acknowledged said instrument by him so executed to be his free act and deed as such *President*, and the free act and deed of said Family Service, Inc.

/s/ Illegible
Notary Public

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

In Providence, in said County, on the *28th* day of *March* A.D. 1951, before me personally appeared the within named *Henry D. Sharp*, to me known and known by me to be one of the persons executing the foregoing instrument in behalf of, Family Service, Inc., and he acknowledged said instrument by him so executed to be his free act and deed and the free act and deed of said Family Service, Inc.

/s/ Nathan D. Goff
Notary Public

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

In Providence, in said County, on the *28th* day of *March* A.D. 1951, before me personally appeared the within named *Preston H. Gardner*, to me known and known by me to be one of the persons executing the foregoing instrument in behalf of, Family Service, Inc., and he acknowledged said instrument by him so executed to be his free act and deed and the free act and deed of said Family Service, Inc.

/s/ Illegible
Notary Public

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

In Providence, in said County, on the 4th day of April A.D. 1951, before me personally appeared the within named *Clarence H. Philbrick*, to me known and known by me to be one of the persons executing the foregoing instrument in behalf of, Family Service, Inc., and he acknowledged said instrument by him so executed to be his free act and deed and the free act and deed of said Family Service, Inc.

/s/ Henry L.P. Beckwith
Notary Public

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

In Providence, in said County, on the 4th day of April A.D. 1951, before me personally appeared the within named *Robert H. Ives Goddard*, to me known and known by me to be one of the persons executing the foregoing instrument in behalf of, Family Service, Inc., and he acknowledged said instrument by him so executed to be his free act and deed and the free act and deed of said Family Service, Inc.

/s/ Illegible
Notary Public

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

In Providence, in said County, on the 4th day of April A.D. 1951, before me personally appeared the within named *George H. Huddy, Jr.*, to me known and known by me to be one of the persons executing the foregoing instrument in behalf of, Family Service, Inc., and he acknowledged said instrument by him so executed to be his free act and deed and the free act and deed of said Family Service, Inc.

/s/ Illegible
Notary Public

STATE OF RHODE ISLAND
KENT, SC.

SUPERIOR COURT

WARWICK LAND TRUST, INC., PAUL HULING, JEANNE M. FOSTER, EILEEN NAUGHTON and KATHLEEN PREISS

VS.

CHILDREN'S FRIEND AND SERVICE, INC., FRANK P. SHERRY, R & F ASSOCIATES, RHODE ISLAND CENTRAL CREDIT UNION and JOHN DOES, ONE through FIVE

VS.

and JAMES O'NEIL, in his capacity as Rhode Island Attorney General, and SAINT TIMOTHY'S CHURCH CORPORATION, WARWICK and WOLOHOJIAN REALTY CORP.

KC 87-811

J U D G M E N T

This matter came on for hearing before the Court, Mr. Justice Bourcier presiding, on June 13, 1988, upon Defendant's Motion for Summary Judgment pursuant to Rule 56 of the Rhode Island Rules of Civil Procedure. After hearing thereon, it is hereby

ORDERED AND ADJUDGED

1. The defendants' Motion for Summary Judgment is granted. The Court finds that the real estate in question is not subject to the application of the cy pres doctrine of law which pertains to trust property, and that as a consequence thereof, there remains no material issue of fact to be resolved and defendants are entitled to Judgment as a matter of law.

2. In accordance With Rule 54(b) R.C.P., Judgment for the defendants, Children's Friend and Service, Inc., and R & F Associates

8

on their Motions for Summary Judgment will enter upon the entry of this Judgment, the Court having determined that there is no just reason for delay.

Dated at West Warwick, Rhode Island, this 21st day of July, 1988.

Per Order,

Deputy Clerk

ENTER:

Justice

DATED:

CERTIFICATION

I, the undersigned, hereby certify that I hand delivered a copy of the within Order to the following persons on the 1st day of July, 1988.

Arlene Violet, Esquire
Robert S. Stitt, Esquire
Pearlman & Vogel
750 East Avenue
P.O. Box Drawer 9007
Providence, Rhode Island 02940

Edward Murray, Esquire
Department of Attorney General
72 Pine Street
Providence, Rhode Island 02903

Sanford Resnick, Esquire
250 Centerville Road
Warwick, Rhode Island 02886

Leo T. Connors, Esquire
56 Pine Street
Providence, Rhode Island 02903

Mark C. Hanewich, Esquire
6 Wilkins Drive - Suite 107
Plainville, Massachusetts 02762

Gary R. Pannone, Esquire
Coffey, McGovern & Noel, Ltd.
20 Washington Place
Providence, Rhode Island 02903

William T. Murphy, Esquire
One Turks Head Place
Providence, Rhode Island 02903

Anthony M. Gallone, Esquire
1000 Smith Street
Providence, Rhode Island 02908

1850f

Supreme Court

No. 88-426-Appeal.

Friends of Warwick Pond et al. :

v. :

Children's Friend and Service et al. :

O R D E R

This matter was before the Supreme Court on an order issued to all parties to appear and show cause why the issues involved in this appeal should not be summarily decided.

This action arose out of the allegation by the plaintiffs that the defendants, Chidren's Friend and Service, Inc., as a successor charity holder, should not be permitted to sell certain land for private development and profit. They assert that the parcel of land was originally acquired for charitable purposes and under the doctrine of cy pres the proposed sale should not be permitted.

The Superior Court granted defendants' motion for summary judgment and ruled that the cy pres doctrine had no application. The court found that the original conveyances to defendant were made in fee simple, without any charitable restrictions whatever.

After examining the memoranda submitted by the parties and after hearing their counsel in oral argument, it is the conclusion of the court that cause has not been shown. We are of the opinion that the

gift of the subject real estate was unrestricted and therefore it may be sold and the proceeds may be used for general corporate charitable purposes.

Moreover, the plaintiffs have no standing to bring the complaint in this action. Only the Attorney General has such standing. The Attorney General has indicated that he finds no fault with the sale of this realty by Children's Friend and Service.

Therefore, the appeal of the plaintiffs' is denied and dismissed, the judgment of the Superior Court is affirmed and the papers of the case are remanded to the Superior Court.

Entered as an Order of this Court this 23rd day of February 1989.

By Order,

Matthew J. Smith
Clerk

Justice Kelleher did not participate.

CHAPTER 4

POWERS OF FIDUCIARIES

SECTION
18-4-1 Application of cy pres doctrine.
18-4-2 Powers of trustees.
18-4-3 Arbitration.
18-4-4 Power of sale.
18-4-5 Effect of trustee's receipt.
18-4-6 Conveyance by infant trustee.
18-4-7 Disposition of money payable to infant trustee.
18-4-8 Settlement of debts and claims — Assent of court.
18-4-9 Powers of surviving fiduciaries.
18-4-10 Management powers exercised with court approval.
18-4-11 Purposes for which borrowing authorized.
18-4-12 Leases authorized.
18-4-13 Parties to management proceedings — Guardians ad litem — Costs.
18-4-14 Binding effect of authorized transactions.
18-4-15 Definitions.
18-4-16 Payments or transfers to fiduciaries — Effect of misapplication by fiduciary.
18-4-17 Transfer of negotiable instrument by fiduciary.
18-4-18 Check drawn by fiduciary payable to third person.
18-4-19 Check drawn by and payable to fiduciary.
18-4-20 Deposit in name of fiduciary.
18-4-21 Deposit in fiduciary's personal account.
18-4-22 Administration of trusts.
18-4-23 Charitable remainder trusts.
18-4-24 Termination of Small Trusts.
18-4-25 Consolidation or division of trusts.

18-4-1. Application of cy pres doctrine. — In all cases of charitable gifts of real or personal estate, whether by deed or will, where the purposes of the donor cannot be literally carried into effect, a complaint may be filed for a cy pres application of the trust property; and thereupon all proceedings, orders, and decrees shall be had and taken in the suit, to carry out the intents of the donor as near as may be, that the charity may not fail, and to this end application as aforesaid may be made in the same complaint for appointment of a new trustee or trustees under or pursuant to the provisions of §§ 18-2-1 to 18-2-8, inclusive, or under the general equity powers of the court.

History of Section.
G.L. 1896, ch. 208, § 9; G.L. 1909, ch. 259, § 9; G.L. 1923, ch. 303, § 9; G.L. 1938, ch. 487, § 1; G.L. 1956, § 18-4-1.

Reenactments. The 1988 Reenactment P.L. 1988, ch. 84, § 1) made a punctuation change near the middle of the section; substituted "a new trustee" for "new trustee" near the end of the section; and made several substitutions for the words "said" and "such" throughout the section.

Comparative Legislation. Powers of trustees:

Conn. Gen. Stat. §§ 45-100d — 45-100g.

Mass. Ann. Laws ch. 203, §§ 4A, 4B, 14A, 16-39.